

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TERRY L. FERRIS</b>	)	
Claimant	)	
VS	)	
	)	
<b>MIDWEST READY MIX</b>	)	
Respondent	)	
AND	)	Docket No. 264,435
	)	
<b>FEDERATED MUTUAL INSURANCE</b>	)	
Insurance Carrier	)	
	)	
	)	

**ORDER**

Respondent and its insurance carrier appealed from the August 27, 2002 Award and the August 29, 2002 Order Nunc Pro Tunc entered by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board (Board) heard oral argument on March 4, 2003, in Topeka, Kansas.

**APPEARANCES**

George H. Pearson of Topeka, Kansas, appeared for the claimant. Gary K. Albin of Wichita, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

### ISSUES

In their brief to the Board, respondent and its insurance carrier raised these issues:

1. Whether claimant's injury arose out of and in the course of his employment with respondent.
2. If claimant's injury did arise out of and in the course of his employment with respondent what is the nature and extent of claimant's disability, limited only to his degree of functional impairment.
3. Whether claimant should be bound by the degree of preexisting functional impairment stipulated to by claimant and his earlier employer under the terms of a voluntary settlement agreement in an earlier workers compensation claim.<sup>1</sup>

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant has proven that he sustained personal injury by accident on November 22, 2000, and that the accident arose out of and in the course of his employment with respondent. As a direct consequence of that accident, claimant suffered an aggravation of his preexisting low back injury. Based primarily upon the testimony of Dr. Vita J. Carabetta and Dr. Peter Bieri, the Board finds claimant has a 20 percent functional impairment, of which five percent was preexisting, for an additional 15 percent impairment from this work-related back injury.

Claimant's March 31, 1998 settlement of a workers compensation claim against a former employer for a July 22, 1997 accident does not constitute a stipulation to any particular percentage of preexisting functional impairment. That agreement was for a lump sum payment which compromised and settled all issues. It is not possible to determine how much of that sum was for disability compensation as opposed to compensating claimant for the other benefits he was giving up, such as future medical benefits and the right to review and modification. Furthermore, as the expert medical testimony shows, functional impairment can change over time. The greater weight of the credible evidence is that in November 2000, immediately before the accident which is the subject of this

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<sup>1</sup> Brief of Appellant Respondent and Insurance Carrier, at 2 (filed Oct. 18, 2002).

case, claimant's impairment would have been rated at five percent to the body as a whole under the AMA Guides.<sup>2</sup>

**AWARD**

**WHEREFORE**, the Award entered by Administrative Law Judge Bryce D. Benedict, dated August 27, 2002, as corrected by the Order Nunc Pro Tunc, dated August 29, 2002, should be, and is hereby affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ March, 2003.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c:     George H. Pearson, Attorney for Claimant  
       Gary K. Albin, Attorney for Respondent and Insurance Carrier  
       Bryce D. Benedict, Administrative Law Judge  
       Director, Division of Workers Compensation

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<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed.).